

LETTER OPINION
96-L-205

November 7, 1996

Representative William Gorder
1345 Lawler Ave
Grafton, ND 58237

Dear Representative Gorder:

Thank you for your letter regarding the implied powers of job development authorities.

Like political subdivisions and state agencies, a job development authority (JDA) created under N.D.C.C. ch. 11-11.1 is a creature of state statute and therefore possesses only those powers expressly granted to it by the Legislature or those necessarily implied from the powers expressly granted. See Ebach v. Ralston, 469 N.W.2d 801 (N.D. 1991) (cities); American Federation of State, County, and Municipal Employees, Council No. 95 v. Olson, 338 N.W.2d 97 (N.D. 1983) (public officials); Murphy v. Swanson, 198 N.W. 116 (N.D. 1924) (counties); 1993 N.D. Op. Att'y Gen. L-175 (rural fire protection districts).

The express powers of a JDA are listed in N.D.C.C. § 11-11.1-03, which provides in part:

The job development authority or joint job development authority shall use its financial and other resources to encourage and assist in the development of employment within the county or counties. In fulfilling this objective, the authority may exercise the following powers:

.

3. To hire professional personnel skilled in seeking and promoting new or expanded opportunities within the county or counties.

.

6. To certify a tax levy as provided in section 11-11.1-04 and to expend moneys raised by the tax for the purposes provided in this chapter. A job development authority may accept and expend moneys from any other source.

.

12. To exercise any other powers necessary to carry out the purposes and provisions of this chapter.

As indicated in the above quote, the purpose of a JDA is to "encourage and assist in the development of employment within the county." N.D.C.C. § 11-11.1-03. The question to ask, therefore, when determining if a JDA can exercise a particular power that is not expressly granted to it, is whether the power to be exercised is necessarily implied from those powers expressly granted or is otherwise necessary to carry out the purpose of the JDA. Other than expressing this general standard, it is difficult to precisely identify all implied powers of a JDA without considering the issue in the context of specific powers the JDA wishes to exercise.

Your letter specifically asks whether the county or the JDA has the power to determine the location of a JDA office, to hire JDA staff, and to establish salaries. It is clear that the JDA, and not the county, has the authority to hire professional staff. See N.D.C.C. § 11-11.1-03(3) quoted above. None of the other powers mentioned in your letter are expressly granted to a JDA under N.D.C.C. § 11-11.1-03. The legislative history of the 1985 enactment of N.D.C.C. ch. 11-11.1 and subsequent amendments do not provide any further guidance.

N.D.C.C. § 11-10-20 provides for the location of county offices in general:

The board of county commissioners shall provide a courtroom and jail, and shall provide offices in the courthouse of the county for the sheriff, county treasurer, register of deeds, auditor, clerk of the district court, state's attorney, county superintendent of schools, and any other officer who has charge of public records. If there is no courthouse in the county or if the courthouse erected has insufficient capacity, such offices must be furnished by the county in a suitable building at the county seat for all elected officials, and

at any place within the county for appointive or administrative officials, at the lowest rent to be obtained, provided that this section does not apply where county officials may serve more than one county as may be otherwise authorized by law. . . .

(Emphasis added). All records of a JDA, as a governmental body or agency of a political subdivision, are public records, required to be open and accessible during reasonable office hours unless otherwise specifically provided by law. N.D.C.C. § 44-04-18.

The test for determining if persons are officers is whether "the individuals hold their positions by election or appointment, are paid from public funds, perform duties of a continuous nature which are defined by statute and related to the administration of government including the importance, dignity, and independence of the position." 1993 N.D. Op. Att'y Gen. L-85, L-87 (county weed control board members are county officials), citing Holmgren v. North Dakota Workers Compensation Bureau, 455 N.W.2d 200, 202-04 (N.D. 1990). See also 1994 N.D. Op. Att'y Gen. 96 (county social service board members are county officials). Applying this test to the members of the board of directors of a county JDA, it is my opinion that the members are county officers. See also Ferch v. Housing Authority of Cass County, 59 N.W.2d 849, 866 (N.D. 1953) (commissioners of housing authority are public officers). Although the receipt of public funds by members of the board of directors of a JDA is limited to mileage and expenses, the members are appointed by the board of county commissioners to serve staggered three year terms on the JDA board to encourage the development of employment in the county. See N.D.C.C. § 11-11.1-02.

Because the members of a JDA are "officer[s] . . . [in] charge of public records," it is my opinion that a county is required to provide office space to the county JDA. N.D.C.C. § 11-10-20. See also 1994 N.D. Op. Att'y Gen. L-52 (family planning branch of county public health department); 1981 N.D. Op. Att'y Gen. 232 (county social service board). The office space provided by the county must be "in a suitable building . . . at any place within the county . . . at the lowest rent to be obtained." N.D.C.C. § 11-10-20. If the board of county commissioners has not specified a location for a county JDA, and has simply provided the JDA with funds from which to obtain office space, the JDA would have implied authority under N.D.C.C. § 11-11.1-03(12) to determine the location of the office. However, it is my opinion that N.D.C.C. § 11-10-20 places primary authority over the location of a county JDA office with the board of county commissioners.

Representative William Gorder
November 7, 1996
Page 4

You also ask whether it is the board of county commissioners or the county JDA board that has the authority to hire JDA staff and establish their salaries. As discussed above, N.D.C.C. § 11-11.1-03(3) expressly authorizes the JDA to hire professional staff. In addition to the obligation to provide office space to the JDA under N.D.C.C. § 11-10-20, the board of county commissioners has authority to furnish all things "necessary and incidental to the performance of the duties of their respective offices to be paid out of the county treasury." N.D.C.C. § 11-11-14(8). See also N.D.C.C. § 11-10-21 (books and stationery). Interpreting these statutes, the Attorney General has concluded:

While the sections of law relating to the . . . powers of the county commissioner[s] to provide things necessary and incidental to the performance of the duties of county officials are discretionary with the board of county commissioners, that discretion must be exercised in a reasonable manner. It is my opinion that in the reasonable exercise of their discretion, the mandate that county commissions must provide offices for county officials . . . necessarily carries with it the requirement that those offices be appropriately furnished at a necessary functional level, including all clerical assistance necessary and incidental to the performance of the duties of that county office.

1981 N.D. Op. Att'y Gen. 269, 270.

All county expenditures must be made pursuant to an appropriation by the board of county commissioners. N.D.C.C. § 11-23-09. This office has previously discussed the effect of N.D.C.C. § 11-23-09 on the authority of a board of county commissioners to establish the number and salaries of personnel:

[T]he board of county commissioners, by virtue of the fact that it controls the appropriation, can control the number and salaries of personnel.

If a lump sum is appropriated for all salaries, the county social service board has the authority to set salaries under Section 50-01-09, N.D.C.C., which gives this board general supervisory power over the social service activities. The board of county commissioners has no authority over the salary of an individual employee, unless each individual employee's budgeted salary is

Representative William Gorder
November 7, 1996
Page 5

separately stated in the budget approved by the Board of
County Commissioners.

1981 N.D. Op. Att'y Gen. 369, 370. In my opinion, this conclusion applies to a county JDA as well. Whatever authority, express or implied, that a county JDA may have over personnel and salaries is subject to the spending authority the JDA receives from the county under N.D.C.C. ch. 11-23.

N.D.C.C. §§ 11-10-20, 11-10-21 and 11-11-14(8) do not indicate the manner in which the required office space, supplies, and clerical assistance must be furnished. A county has discretion in determining the amount of tax to be levied for a JDA under N.D.C.C. § 11-11.1-04. Letter from Attorney General Nicholas Spaeth to Kenneth Thompson (April 12, 1992). Because the determination of how much tax to levy under this section must be based on the budget the county has approved for the JDA, it is reasonable to assume that this determination includes the cost of office space, supplies and clerical assistance the county is required to provide. Thus, if the county approves a budget for the JDA which simply provides funds to the JDA for office space, supplies, and clerical assistance, the JDA would have implied authority under N.D.C.C. § 11-11.1-03(12) spend the funds accordingly. On the other hand, in approving a budget for the JDA under N.D.C.C. ch. 11-23, the county would be authorized to provide office space, supplies, and clerical assistance directly to the JDA and would not be required to include funds for those expenses in the JDA budget.

In summary, a county JDA has general authority to spend any tax proceeds deposited in the job development authority fund and any funds it receives from other sources. N.D.C.C. §§ 11-11.1-03(6), 11-11.1-04. A county JDA is also expressly authorized to hire professional personnel. N.D.C.C. § 11-11.1-03(3). Based on these express powers, it is my opinion that a county JDA has the implied power to hire administrative or support staff that it finds necessary to encourage or assist in the development of jobs in the county and to establish the salary of those employees. However, this power is limited by the spending authority and appropriations the county JDA has received from the board of county commissioners under N.D.C.C. ch. 11-23.

Sincerely,

Representative William Gorder
November 7, 1996
Page 6

Heidi Heitkamp
ATTORNEY GENERAL

jcf/vkk